SUPREME COURT, U. S.

FIL
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MICHAEL RODAK,

No. 74-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

JOHN E. MOSS, ET AL, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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February 20, 1975

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Petitioners John E. Moss et al. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered August 15, 1974, said writ to issue only in the event the Court should determine to grant a writ of certiorari in Federal Power Commission v. John E. Moss et al., No. 74-883, filed January 17, 1975, which seeks review of only one of the issues decided by the court below.

OPINIONS BELOW

The opinion of the court of appeals is reported at 502 F.2d 461, and is reprinted as Appendix A to the petition for certiorari in

No. 74-883 (hereinafter FPC Pet.). The order of the Federal Power Commission (Order No. 455) is reported at 48 FPC 218 (FPC Pet. App. D), and the Commission's order denying rehearing (Order No. 455-A) is reported at 48 FPC 477 (FPC Pet. App. E).

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1974 (FPC Pet. App. B), and petitions for rehearing were denied on September 19, 1975 (FPC Pet. App. C). On December 12, 1974, this Court extended the time for filing a petition for writ of certiorari until January 17, 1975, and on January 17 the FPC filed its petition, FPC v. Moss, No. 74-883.

Cross-petitioners Moss et al., while not previously of the view that certiorari was essential on the issues decided adversely to them, believe that the issue raised by the Commission's petition, assuming it is cert-worthy, cannot meaningfully be considered in isolation from the other issues decided contemporaneously by the court of appeals. Thus, the necessity for the instant conditional cross-petition did not arise until after the filing of the Commission's petition on January 17, 1975, and this cross-petition is being filed within 30 days of receipt of the Commission's petition.

The procedure followed by cross-petitioners conforms to the procedure approved by this Court in Ray v. Pierson, cert. granted, 384 U.S. 938. See also Texaco Inc. v. FPC, No. 1231,

O.T. 1966 (renumbered No. 82, O.T. 1967); Texaco Inc. v. FPC, No. 628, O.T. 1967.

QUESTION PRESENTED

Whether the Federal Power Commission has power, under the Natural Gas Act, to adopt an "optional procedure" for new producer sales that permits producers (1) to charge rates in excess of the just and reasonable area rate ceilings, (2) to collect, free from refund obligation during the period prior to Commission certification, contract rates that on certification are found to be excessive, (3) to effectuate future rate increases free from contemporaneous Commission review, and (4) to abandon service at the end of the contract term without the further Commission approval required by Section 7(b) of the Act.

STATUTE INVOLVED

Sections 4, 5, and 7 of the Natural Gas Act, as amended, 15 U.S.C. §§717c, 717d, and 717f, are set out in FPC Pet. App. F.

STATEMENT

The facts of this case are fully and accurately set forth in the Brief of Moss et al. in Opposition filed February 20, 1975 in FPC v. Moss, No. 74-883.

REASONS FOR GRANTING THE WRIT

The Commission's purpose in promulgating its "optional procedure" rule was to establish a method outside the statutorily required regulatory scheme for permitting the producers more than could be granted them under regulation: higher prices,

freedom from refund obligation, freedom from rate review, and freedom to abandon service at the end of the contract term.

Since the purpose of the Commission's new rule could not lawfully be achieved under a long line of decisions of which F.P.C. v. Texaco Inc., 417 U.S. 380, was merely the latest, the court of appeals interpreted the substantive rate standard and the rate increase procedure in a manner that would render them lawful (while simultaneously and necessarily depriving them of their intended effect). On the remaining two issues the court of appeals apparently was unable to arrive at an interpretation that would render them lawful, and, in effect, compromised, holding the no-refund provision lawful, and the "pregranted abandonment" provision unlawful. While we believe the latter holding was correct, we submit that the former was not.*

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* To permit the collection of excessive rates free from refund obligation defeats the essential statutory purpose of assuring "consumers a complete, permanent and effective bond of protection from excessive rates and charges," Atlantic Refining Co. v. Public Service Commission, 360 U.S. 378 at 388 (1959); see also United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223 at 229-30 (1965); Public Service Commission v. F.P.C., 329 F.2d 242 at 249 (1964), cert. denied, 377 U.S. 963; Tenneco Oil Co. v. F.P.C., 442 F.2d 489 at 492, 496 (5th Cir. 1971).

The more important question raised by the approach of the court of appeals, however, is whether its legitimization-by-interpretation of the basic rate-determination standard under the optional procedure was appropriate in light of the fact that "optional procedure" (like the small-producer exemption condemned in Texaco, and like the essentially standardless emergency and limited-term sales now under attack in other court proceedings) was intended to provide producers with a higher than just-and-reasonable price, i.e., a price made unlawful by the basic organic statute under which the Commission operates. As this Court noted last Term under parallel circumstances:

> "[T]he Act makes unlawful all rates which are not just and reasonable, and does not say a little unlawfulness is permitted." F.P.C. v. Texaco Inc., 417 U.S. 380 at 399.

And, as a practical matter, the pernicious consequences of permitting formalized extra-legal procedures to remain in effect pending a determination of their legality cannot be ignored. The new procedures--of which optional pricing is the most important--were promulgated shortly after the Commission had fixed the just and reasonable ceiling for the major producing areas at 26¢ per Mcf.* Given the choice of initiating their

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* The Commission's action--FPC Opinion No. 598, 46 FPC 86 (1971)--was affirmed by this Court only last June, Mobil Oil Corp. v. F.P.C., 417 U.S. 283. The 26¢ ceiling set by Opinion No.

new sales at the 26¢ ceiling or the 40¢-50¢ allowed under the alternative procedures, which subordinated or ignored just-and-reasonable standards, the producers chose the above-ceiling prices, see FPC Release No. 21087, Feb. 3, 1975, pp. 24-26; and while the 40¢-50¢ above-ceiling level totally supplanted the 26¢ ceiling price for new supplies, the volume of new supplies did not increase.

The Commission's response to this development, however, was to raise the just-and-reasonable ceiling to the 40¢-50¢ level permitted by its extraordinary procedures, FPC Opinion No. 699 (June 21, 1974).* While originally indicating that it would limit future use of emergency and limited-term certificates, the Commission subsequently reinstated these procedures, essentially on the industry's representation that even the new 50¢ level would not assure adequate supplies, Opinion No. 699-B (Sept. 9, 1974).

The latest turn of the wheel is provided

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598 was itself 30-40% above prior ceilings, and was adopted upon producer representations that it would provide the requisite incentive for exploration and dedication of new reserves to the interstate market.

* On rehearing, the level was raised to 50¢-60¢ per Mcf, Opinion No. 699-H (Dec. 4, 1974). Appeals from Opinion No. 699 and 699-H are presently pending in five circuits, with ultimate venue not yet determined.

by a recent FPC notice of a proposed sale from the offshore Louisiana area under the optional procedure at $1.44 per Mcf, Coleve, a Joint Venture, CI75-438, notice issued February 14, 1975.

Thus, the basic practical difficulty with loopholes like the optional procedure is that, by offering a price in excess of the just and reasonable ceiling, they undercut the ceiling rate and continually force it upward to whatever the market will bear. The basic legal difficulty is that Congress, by enacting the Natural Gas Act, intended to assure that natural gas prices would not be based on a standard of what the market will bear.

No basis exists for permitting such a gross departure from the statutory plan. Since the only purpose of the optional procedure is to provide an unwarranted exception to Commission-determined just-and-reasonable ceilings, the appropriate solution to the optional procedure is not reform through interpretation but outright reversal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that in the event the Court should grant the petition for a writ of certiorari in No. 74-883, this petition for a writ of certiorari should likewise be granted.

Respectfully submitted,

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